Supreme Court, U.S.
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No. 93-1013

In The

Supreme Court of the United States

October Term, 1993

CITY OF LOS ANGELES,

Petitioner,

vs.

TOPANGA PRESS, INC.; STUART PARR; BRAND X VIDEO, INC.; E.W.A.P., INC; LIBRARY ONE, INC.; HARDROCK, INC.; BEVERLY BOOKS, INC.; WHITEY, INC.; NEW WAVE, INC.; N.F.M. CORPORATION; PLUSH BOUTIQUE; CAROLINA ENTERPRISES; DASH, INC.; JOTH, INC.; JOAMAR, INC.; JAN RUBINI; 7180 SUNSET BLVD., INC.; A.L.Q. CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's affirmance of a preliminary injunction below in direct conflict with *Young v. American Mini Theaters*, 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986); and *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 115 L.Ed.2d 504 (1991); and, if so, is any such conflict so great as to warrant intervention by this Court at this very interim stage of the case?

2. Did the District Court abuse its discretion by issuing a preliminary injunction against enforcement of certain limited portions of Los Angeles' adult entertainment zoning ordinance under circumstances where the City has conceded that enforcement of those portions of the ordinance would have immediately eliminated from the City of Los Angeles all but one of its existing expressive adult entertainment businesses and, if so, is any such abuse so great as to warrant intervention by this Court at this very interim stage of the case?

3. Should this Court grant review at this interim stage to examine a ripeness issue which was not addressed by the Ninth Circuit in its intermediate ruling below?

4. Should this Court grant review at this interim stage to examine a statute of limitations issue which was not addressed by the Ninth Circuit in its intermediate ruling below?

LIST OF PARTIES

All appellees in the Court of Appeals have been named as respondents in the petition herein and their names are set forth in full on the cover of this document and the petition.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

To the knowledge of undersigned counsel there are no parent companies of the corporations who are respondents herein, nor are there any subsidiary companies other than wholly owned subsidiaries, if any.

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Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner seeks review of the Ninth Circuit Court of Appeals' affirmance of a preliminary injunction issued to preserve the status quo pending a trial to determine whether Los Angeles' adult zoning ordinance challenged in this case is constitutional. As yet, there has

been *no* substantive determination of that ultimate question of constitutional law. While much evidence was offered by both sides in connection with the preliminary injunction motion, most of the dispositive facts in this case remain to be adjudicated.

The City of Los Angeles (hereinafter alternatively "City" or "petitioner") suggests that there is sufficient need to warrant immediate review by this Court at this very early stage of the case because the ordinance is assertedly "consistent with the clear authority of *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) . . . and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)." Whether this ordinance is ultimately found to be authorized (or condemned) by *Young* or *Renton* is a determination that surely would best await a trial on the merits after all relevant facts can be determined by the trial court.

OPINIONS AND ORDERS BELOW

Respondents adopt the presentation of these matters as set forth in the petition.

JURISDICTION

Respondents adopt the statement of jurisdiction in the Petition, except to the extent that the Petition indicates 28 U.S.C. § 2103 as the statutory basis for this Court's jurisdiction. That section was repealed in 1988. Nonetheless, respondents concede that this Court has

proper jurisdiction under the provisions of 28 U.S.C. § 1254 (1).

By order of Justice Sandra Day O'Connor, pursuant to Rule 15.2 of this Court, the date for filing of this Brief in Opposition to Petition for Writ of Certiorari was extended to Monday, March 21, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondents adopt the presentation of these matters as set forth in the petition.

STATEMENT OF THE CASE

A. History And Background Underlying The City's Ordinance.

Respondents adopt petitioner's brief description of the various ordinances involved in this case. However, respondents wish to supplement petitioner's statement by providing some of the salient facts regarding the history and background for these ordinances which do not appear in the petition.

Contrary to the conclusion assertedly reached by the Los Angeles City Council (quoted in the Petition at p. 5) in its self-serving statement of purpose in support of the City's original 1978 adult entertainment zoning ordinance (an ordinance not challenged herein), the original study conducted by the City to investigate the effect of a concentration of adult entertainment businesses in various

parts of Los Angeles did *not* produce any objective evidence of blight or depressed property values attributable to the presence of adult entertainment businesses. Neither did it present any clear pattern of evidence demonstrating an increased likelihood of crime in the neighborhoods where such businesses were located, as compared to similar neighborhoods where such businesses were absent. Nonetheless, after the City's enactment of its original 1978 adult zoning ordinance (which applied only *prospectively* and which prohibited independent adult businesses from being established within 1,000 feet of each other or within 500 feet of any church, school, or park), the adult entertainment industry in Los Angeles accepted that ordinance as a reasonable compromise between those who wanted to limit continued proliferation of such businesses and the need to provide a sufficiently reasonable number of viable locations for such businesses that the public's access to this type of constitutionally protected material would not be significantly impaired.

The Petition also describes a "1985 Study . . . which produced additional evidence of the degrading effects of adult businesses on nearby areas." The study in question, itself, however, cautioned that "this was not a scientifically conducted survey, but rather a public observation and opinion poll . . . ."[1]

The Petition's discussion of the legislative history also omits mention of the fact that, in May of 1978, a few

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[1] This statement appears at p. 6 of the City Planning Director's report of June 6, 1985, and appears as Exhibit 10 in the Excerpts Of Record filed by the City in the Court of Appeals.

months before enactment of the city's initial adult zoning ordinance, City Planning Department officials conducted careful studies to determine what effect a 500 foot residential proximity prohibition would have on the number of adult businesses in Los Angeles, as well as whether the City had a valid need for such a provision. The City's own Study concluded:

> *"Such a prohibition was considered to be overly restrictive in light of the preponderance of highway oriented commercial zoning in the City, typically with shallow frontage and typically adjoining residentially zoned property.* Further, after discussions with the Planning and Environment Committee, it was determined that *the concentration of adult entertainment businesses can be prevented adequately by the imposition of the aforementioned 1,000 feet [from other adult businesses] and 500 feet [from churches, schools and parks] separation criteria contained in the final ordinance."* (Emphasis added.) CDT[2] 137:47, and *see* CDT 137:40-41.

Thereafter, in 1982, when the Council was again considering further restrictions on the location for adult entertainment businesses, Claudia McGee Henry, Assistant City Attorney and opposing counsel herein, sent a very revealing and confidential letter to certain City Council members. In this letter, the City Attorney's office quietly informed the Council that enactment of the 500 foot residential proximity restriction here challenged

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[2] The reference "CDT" is to the clerk's docket entries in *Topanga Press, Inc. v. City of Los Angeles*, C.D. Cal. No. CV 88-7838 RG, the lead case of seven cases consolidated below. "CDT 137:47" indicates that the reference is to page 47 of the document filed as entry 137 in the clerk's docket.

"would result in the closure of almost every existing adult entertainment business in the city" and that, "[b]ased on this fact, *there is a substantial likelihood that a court would conclude that the proposal has more than an incidental effect on First Amendment protected activities."* CDT 137:9-10. (Emphasis added.)

Nonetheless, shortly after this Court's decision in *Renton*, the City apparently concluded that this Court had removed all constitutional barriers to the enactment of such legislation, no matter how devastating its effect. This Court's *Renton* decision was handed down on February 25, 1986. On April 11, 1986, less than two months after the opinion in *Renton*, the City Council enacted its amendment forcing the closure of all existing lawful conforming adult entertainment businesses operating within 500 feet of a residential zone.[3] It was "Approved as to Form and Legality" by the same Assistant City Attorney who had cautioned, four years earlier, that its enactment "would result in the closure of almost every existing adult entertainment business in the city."

In support of their motions for preliminary injunction, respondents submitted uncontroverted evidence

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[3] As a result of obvious zeal following this Court's decision in *Renton*, the City's 1986 amendment *additionally* prohibited adult entertainment businesses from operating within 500 feet of any *agricultural* zone. Of course, this merely compounded the restrictive impact of the ordinance even beyond the devastating impact caused by the residential proximity restriction. The amendment also, for the first time, additionally banned otherwise lawful adult entertainment businesses from operating within many of the City's otherwise permissible *commercial* districts!

showing that the number of adult entertainment businesses in Los Angeles had been reduced from well over 200 to significantly less than half of that number since the City first adopted its original adult zoning ordinance in 1978.[4]

Respondents also presented substantial evidence to prove the truth of the City Attorney's 1982 prediction as to the devastating effect which the 500 foot residential proximity restriction would have on existing adult businesses. The evidence obtained through discovery indicated that if the adult zoning ordinance were allowed to take complete effect, all but one of the existing adult entertainment businesses in the City of Los Angeles would be forced to close.

Respondents also presented voluminous studies and evidence to demonstrate that, by addition of the residential proximity restrictions of the ordinance, the overall zoning scheme will also effectively deny a reasonable opportunity for any *new* adult entertainment businesses to find a viable site. At this preliminary stage of the case, the evidence concerning the effect on *new* adult entertainment businesses is very much in dispute (suggesting

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[4] In its 1973 opinion in *Kaplan v. California*, 413 U.S. 115, 116 (1973), this Court found that there were "approximately 250 'adult' bookstores in the City of Los Angeles, California." This Court's opinion did not indicate how many *other* adult businesses were then in the City of Los Angeles but, presumably, the total number of such businesses was far greater than 250. In response to discovery below, the City of Los Angeles has identified only 102 different adult entertainment businesses that are either currently in existence in the City of Los Angeles or that existed there as of 1988. CDT 138:3-4 and 138:26, fn 12.

again that it would be unwise to grant review at this preliminary stage of the case). In any event, the evidence presented by respondents in support of the preliminary injunction concerning the effect of the ordinance on *new* adult entertainment businesses (or on old ones which would be forced to attempt to find relocation sites) was as follows:

1. Initially, respondents hired a professional cartographer and geographer, Michael Taugher, for the purpose of determining the location of those sites within the City that would be "legally permissible" (even if totally unusable) for an adult entertainment business. To accomplish this task, Mr. Taugher was given a copy of all relevant zoning provisions from the City Code and he then obtained comprehensive zoning maps for the entire City of Los Angeles. Next, he conducted extensive field studies of all locations within the City which were in proper zoning classifications (*e.g.*, which were in the proper commercial or manufacturing zones) and which were not within 500 feet of residential or agricultural property. It was then necessary for him to determine the location of all distance-triggering "sensitive" uses (including churches, schools and parks) in order to additionally carve out a 500 foot radius around all such locations (as such areas would be impermissible for any new adult entertainment business). Mr. Taugher then presented computer drawn maps demonstrating that only 6.54% of the total acreage of the City was "definitionally permissible" for use by an adult entertainment business, *i.e.*, only 6.54% of the City's overall area would be legal (vis-a-vis the City's zoning laws) if used by an adult entertainment business. However, *less than 0.18% of the*

City's commercially zoned land is located in those "definitionally permissible" areas. CDT 100:7.

2. Using *extremely* conservative criteria, Mr. Taugher next subtracted from the 6.54% that acreage which was, to even the most casual observer, most obviously unusable for *any* commercial retail business. This eliminated areas such as many thousands of acres of land under water in the Los Angeles Harbor and the runways at Los Angeles International Airport. (CDT 100:6 and CDT 132:8-10.) *The remaining percentage of "legally permissible" land was 2.46%,* almost none of which was in commercially zoned land and almost all of which was deeply buried in the back of highly unsuitable manufacturing areas. (CDT 100:8.)

3. Respondents then hired a second expert, Mr. Bruce Bailey, a commercial real estate specialist with a prominent San Fernando Valley commercial real estate firm. (CDT 131:1-3.) Mr. Bailey personally accompanied Mr. Taugher to each and every one of the sites which Taugher had identified as "legally" or "definitionally" permissible. (CDT 131:3.) Bailey's job was to apply the standard criteria that he would use in finding a feasible commercial site for any other commercial retail client and to then determine how many commercially feasible sites existed within Taugher's 6.54% of the City for use by the various types of adult entertainment businesses regulated by the ordinance. CDT 131:3, ¶ 4 and 6.

4. In performing his analysis, Mr. Bailey did *not* exclude any property simply because it was undeveloped

or not currently for rent or sale. CDT 131:3, ¶ 5. Instead, he looked at all the property in the "definitionally permissible" areas identified by Taugher and attempted to determine the number of sites which would be at all viable for an adult entertainment business *assuming, arguendo, it were able to acquire the property*. In making those determinations, Bailey did not eliminate a location as "unfeasible" or "non-viable" unless he concluded that *no* adult bookstore, theater or cabaret could conceivably conduct a viable business at the location. Moreover, he provided a detailed list of the criteria he was applying in making these eliminations. CDT 131:3-7.

5. After personally inspecting many thousands of locations and all the locations indicated by Taugher, Bailey concluded:

> a) He could not find even one "potentially viable," lawful location for an adult motion picture theater (CDT 131:8);
>
> b) There were, at most, 20 "potentially viable," lawful locations for adult cabarets (*id.*);
>
> c) There were no more than 100 "potentially viable," lawful locations for adult bookstores (*id.*).

He made no finding that any of these "potentially viable" sites were in fact available. CDT 131:8.

6. Bailey also declared that these very few "potentially viable" locations would require further and more detailed analysis to determine if in fact they were truly

usable or suitable for a new adult business. This would require closer examination of a variety of location-specific details. CDT 131:8. Additionally, he determined that these very few "potentially viable" sites were not clustered in the same area, thereby making the prospect of a client actually acquiring one of those sites far more remote.[5] CDT 131:8-9.

7. Mr. Bailey also concluded that, based upon his experience, the existence of only 100 "potentially viable" locations for adult bookstores that are scattered throughout the entire City would make it exceedingly difficult to find even *one* location that such a bookstore could actually acquire. He explained that, based on his experience, a commercial business ordinarily requires a very large base of potential locations in order to actually succeed in securing one. Specifically, he stated that he typically needs about 150 possible *viable* locations in order to find one actual, *available* location[6] for a retail client for whom he is attempting to find a relocation site. CDT 131:8-9.

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[5] As explained in Mr. Bailey's Declaration, a client is much more likely to be able to find a property available if there are numerous other similarly suitable properties in the same general area. Where, as here, the potentially suitable properties are widely scattered, it is highly unlikely, from a commercial real estate perspective, that any of them will actually be able to be acquired. CDT 131:8-9.

[6] Again, however, Mr. Bailey's conclusions as to the limited number of *viable* locations for these businesses was not premised in any way on any requirement that they be actually *available*. *Renton* clearly prohibits actual current availability to form part of the relevant calculus in determining the number of feasible sites.

8. As an example, Bailey testified that he was previously hired by the Blockbuster Video chain to find a location for them within the Westchester district of Los Angeles. In doing so, he had initially identified 100 locations within Westchester that would be viable locations for locating one of their stores. However, after three months of diligent attempts, he was unable to find even one location that his client could actually acquire. He testified that it would certainly be no easier for one intending to operate an adult entertainment business to acquire such property. CDT 131:9.

9. Bailey also predicted that the combined ordinances would effectively prevent adult businesses from acquiring *any* viable locations within the entire San Fernando Valley (a somewhat geographically isolated portion of the City of Los Angeles populated by well over a million people). CDT 131:9-10.

10. Finally, superimposed upon all these limitations is the significant limitation that none of the acreage figures given in Taugher's study (i.e., neither the "definitionally permissible" areas, nor the areas which remain after subtracting from the "definitionally permissible" areas, the most obviously unusable areas) in fact constitute land that would be even potentially available for more than one adult entertainment business. This is because once one adult entertainment business occupies one of these locations, the ordinance's ban on any other adult business within 1,000 feet precludes any *other* adult entertainment business from locating within a contiguous

72-acre circle around that first such business.[7] The more businesses there are that find locations, the diminishment of available areas for the next business becomes exponential. CDT 132:11-12

In sum, respondents presented voluminous evidence below demonstrating the devastating effect which the challenged ordinance would have not only on *existing* adult entertainment businesses, but also on any new such businesses that might attempt to open in the City. In contrast, the City vigorously disputes the significance of the evidence presented by respondents. Because this case is only at the preliminary injunction stage, the trial court, of course, has made no findings of fact with respect to *any* of this evidence.

B. Proceedings Below

For the most part, respondents adopt the description of the proceedings below presented by the City. However, respondents reject the City's characterization of two of their three motions for preliminary injunction. The second of respondents' three preliminary injunction motions sought to prevent enforcement of the 1983 amendment to the ordinance which the City had construed and interpreted as prohibiting, *inter alia*, multiple adult *uses* within a single adult entertainment business.[8]

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[7] *See, Walnut Properties v. Whittier*, 861 F.2d 1102, 1108, fn.4 (9th Cir. 1988).

[8] The ordinance defines every adult entertainment use as constituting a distinct adult entertainment "business" and then demands that all such "businesses" be in separate buildings.

The third preliminary injunction motion filed by plaintiffs was not directed against the entire adult zoning ordinance, but only against the portions challenged in the first two preliminary injunction motions, *i.e.*, the 1986 residential proximity restriction and the 1983 amendment which has been construed by the City to effectively prohibit multiple adult entertainment uses within a single business. The third preliminary injunction motion challenges those two limited portions of the ordinance on the ground that the ordinance's definitional provisions are impermissibly vague.[9]

REASONS FOR DENYING THE WRIT

The reasons for denying certiorari at the present stage of this case are numerous, and include the following:

Through use of the euphemism of describing each adult entertainment activity within a single business as a separate adult entertainment "business", the city has imposed on the ordinance a construction which respondents challenge both as a matter of statutory construction and, as so construed, as being in direct violation of the First Amendment. There were also a variety of distinct challenges to this provision based upon the construction of certain grandfather provisions in the ordinance. The grandfather provisions did not apply equally to all similarly situated plaintiffs.

[9] Different vagueness challenges were raised by a variety of plaintiffs who, by declaration, each presented a distinct factual basis for showing that the ordinance was vague in its application to *them*. As the Ninth Circuit's opinion did not address the vagueness challenge for purposes of its interim ruling, there would seem to be little point to interim review by this Court on that issue.

A. Review Is Premature At This Preliminary Stage Of The Case.

As explained above, neither the District Court nor the Court of Appeals made any finding concerning the constitutionality of this ordinance, nor did either court make any findings of fact. The District Court merely noted that the equities strongly favored preservation of the status quo pending trial and that respondents had at least presented sufficiently significant factual issues to merit preservation of the status quo until they could be resolved at trial.

While this Court, of course, has *jurisdiction* to accept review of even the most interim of rulings from the lower federal court system, it has traditionally followed a well established pattern of exercising prudential restraint in reviewing cases prior to a final judgment below. *See, e.g.*, Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, 7th Ed. 1993, pp. 195-198, and cases there cited.

An additional reason counseling restraint based upon the interim nature of this case is the fact that there are a number of very significant constitutional questions raised herein which have not, as of yet, even been *addressed* by the courts below in these proceedings. For example, both courts below found it unnecessary to address respondents' numerous and distinct claims of vagueness in light of the fact that preservation of the status quo seemed warranted simply based upon the potential overall restrictive effect of the ordinance and the voluminous evidence offered in support of that point. At a trial, all of the distinct constitutional and statutory bases of challenge would likely be addressed, providing this Court

with a full opportunity for a complete review of the entire action in one proceeding, upon any subsequent appeal from a final judgment herein.

B. There Is No Conflict Between The Opinion Of The Court Of Appeals And The Prior Decisions Of This Court.

City of Renton v. Playtime Theatres, Inc., supra, represents this Court's decision most favorable to the City when analyzing the constitutionality of adult entertainment zoning laws. However, even under the standards articulated in that case, this Court made it clear that "the First Amendment requires . . . that [a city] refrain from *effectively* denying respondents a *reasonable* opportunity to open and operate an adult [business] within the City . . . . " 475 U.S. at 54. Emphasis added.

At this interim stage of the case, there is a very significant factual dispute as to whether the City of Los Angeles has *effectively* denied respondents a *reasonable* opportunity to operate adult businesses within the City. While the opinion of the Court of Appeals examines this question from a number of perspectives, it does not disagree with the underlying notion that, on remand, the *Renton* test, as articulated above, must provide the ultimate guidance for the trial court. Accordingly, it would be a waste of judicial resources for this Court to review the preliminary discussion of these matters by the Court of Appeals prior to reviewing a final judgment where the District Court has made a factual determination whether the City has *effectively* denied respondents a *reasonable*

opportunity to operate their adult entertainment businesses.

C. The Equities Overwhelmingly Support Preservation Of The Status Quo Pending Trial.

In the underlying lawsuit, respondents do not challenge in any way the backbone of the City's adult zoning ordinance, *i.e.*, the original 1978 provisions which prohibit independent adult entertainment businesses from operating within 1,000 feet of each other and which prohibit them from operating within 500 feet of any church, school, or park. The City remains fully free to enforce those provisions against anyone in the city.

Neither does the preliminary injunction prevent the City from enforcing against any *new* businesses its amendments prohibiting residential proximity. The *sole* impact of the existing interim injunction is to simply preserve the status quo *only as to these litigants* pending a full trial on the merits.

The only "urgency" supporting the City's claimed need for immediate review by this Court is the fact that the preliminary injunction has prevented the City from immediately forcing the closure of all of the relatively few adult entertainment businesses in this lawsuit. All but one of these once lawfully conforming businesses became nonconforming uses by virtue of the 1986 amendment which required the termination of all preexisting and lawful adult entertainment businesses located within 500 feet of residentially zoned property.

Certainly, under these circumstances, it cannot be said that the two courts below abused their discretion by simply preserving the status quo and preventing irreparable injury pending a final determination of the ultimate constitutional questions at trial. *A fortiori*, there appears to be very little reason why this Court should intervene in this case, particularly since there has been no final determination of the constitutionality of the ordinance.

D. Contrary To The Suggestion In The Petition, The Court Of Appeals' Opinion Does Not Conflict With This Court's Decision In Barnes.

There is absolutely no basis for any potential conflict between the Court of Appeals' opinion herein and this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. ___, 111 S.Ct. 2456 (1991). Justice Scalia's concurrence in *Barnes* provided the necessary fifth vote for a judgment upholding the Indiana anti-nudity law in that case. The articulated basis for Justice Scalia's upholding of that law was that it was not subject to First Amendment scrutiny because it was a law of general application which did not single out or otherwise disproportionately impose its impact on those engaged in First Amendment activities. However, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court ruled that First Amendment considerations *do* apply where, as here, a law singles out "adult entertainment businesses" for its restrictions, many, but not all, of which are businesses distinguished by their

engagement in presumptively protected First Amendment activity[10]. Accordingly, since the adult zoning ordinance in this case, unlike the public anti-nudity statute in *Barnes*, singles out the same small category of businesses singled out in *FW/PBS* (many, but not all, of which are businesses engaged in sexually oriented *expression*), the Ninth Circuit's application of the First Amendment principles of *Renton* and *Young* is clearly not in conflict with the opinions of a majority of this Court as expressed in *Barnes*.

Moreover, the strictures of Los Angeles' adult zoning ordinance are not triggered as to exotic dancing activities only when the performers remove G-strings or pasties.[11] *Any* exposure of *any* portion of the female breast below the top of the areola, or of *any* portion of the buttocks,

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[10] "The businesses regulated by [Dallas'] licensing scheme include adult arcades . . . , adult bookstores or adult video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, and sexual encounter centers . . . . Although the ordinance applies to some businesses that apparently are not protected by the First Amendment, *e.g.*, escort agencies and sexual encounter centers, it largely targets businesses purveying sexually explicit speech which the City concedes for purposes of these cases are protected by the First Amendment." 493 U.S. at 224.

" * * * We, therefore, hold, as a threshold matter, that petitioners may raise a facial challenge to the licensing scheme, and that as the suit comes to us, the businesses challenging the scheme have a valid First Amendment interest." 493 U.S. at 225.

[11] Chief Justice Rehnquist's plurality opinion in *Barnes* made clear that First Amendment principles *do* apply to exotic dancing performances where the performers at least retain the minimal coverings of "G-strings" and "pasties." ___ U.S. at ___, 111 S.Ct. at 2463.

will trigger operation of the Los Angeles ordinance. Accordingly, since the ordinance's definitions of "adult theaters" and "adult cabarets" have not been limited to "*Barnes* proportions," the Court of Appeals' utilization of First Amendment doctrines derived from *Young* and *Renton* cannot *possibly* be in conflict with this Court's opinion in *Barnes*.

Finally, the dancing performances at those of plaintiffs' businesses which are either "adult theaters" or "adult cabarets," as defined in the ordinance, do not involve the exclusive exhibition of totally nude dancing performances. All of these businesses feature performances where a dancer will begin her dance with all private parts of her anatomy fully covered. As the dance progresses, portions of the anatomy are revealed which bring the establishment under the broad definitions for "adult cabaret" or "adult theater" in the ordinance, but which still do not involve total or even partial nudity.[12] As a result, as a simply factual matter, the ordinance prohibits conduct at respondents' establishments which even the most expansive reading of *Barnes* would find to be fully protected by the First Amendment.[13] Accordingly, there is no conceivable basis for granting certiorari herein based upon any perceived conflict with *Barnes*.

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[12] Thereafter, fully or partially nude dancing occurs.

[13] The record developed in support of the preliminary injunction (which was issued before *Barnes* was decided) does not provide the detailed description set out above concerning the dance performances exhibited in plaintiffs' establishments. These, however, are the facts and they will be fully developed at trial, given their new post-*Barnes* relevance.

E. The Interlocutory Ruling Herein Would Be A Particularly Poor Vehicle For Addressing Any Perceived Conflicts Among The Lower State And Federal Courts Involving Adult Zoning Legislation.

The City also asserts that the opinion below is in conflict with adult zoning decisions of other federal courts of appeals and of the California Supreme Court. A key factor, however, is that each of these opinions identified by the City represents a final judgment applying principles of constitutional law to settled facts. The present ruling by the Court of Appeals merely preserving the status quo pending trial would be a particularly poor vehicle for addressing any perceived conflicts among the lower state and federal courts involving adult zoning legislation. There has simply been no factual determination yet of the most dispositive facts in this case, *i.e.*, whether the ordinances here challenged "*effectively* deny[] respondents a *reasonable* opportunity to open and operate [their] adult [businesses] within the city . . . . " *Renton, supra*, 475 U.S. at 54. Until these facts are determined at trial, the present case will remain a particularly poor vehicle for resolving any perceived conflict among the *other* federal circuits (assuming *arguendo*, that any exists).

F. The City's Assertion That Certiorari Should Be Granted To Analyze A "Statute Of Limitations" Issue Is Utterly Without Merit.

The City's fourth question presented requests certiorari review of the question of whether the present dispute is barred by the statute of limitations. This issue, which petitioner raised in the Court of Appeals *only in its*

Petition for Rehearing, was not, of course, addressed by the Court of Appeals in its opinion. If there is any ultimate error in this regard, this Court can certainly correct it following review from a final judgment. However, since the Court of Appeals did not even *address* this issue, its opinion can hardly create a conflict worthy of certiorari review by this Court at this time.

Simply for the record, respondents' position is that the City's statute of limitations argument is frivolous because the statute of limitations' principles relied upon by the City are derived exclusively from cases where *damages* were sought; those principles are neither supported by, nor applicable to, cases such as the present ones where exclusively *equitable* relief is sought. This Court has repeatedly admonished plaintiffs seeking prospective injunctive relief to withhold raising facial challenges to allegedly unconstitutional laws until they can demonstrate a sufficient personal stake in the outcome to merit resolution by the courts. Moreover, federal injunctive relief is typically issued only when there is no alternative way that a plaintiff can resolve a problem. However, in the present case, there were numerous reasons why the various consolidated plaintiffs below brought the seven originally separate lawsuits at the various points in time when they did. Without going into detail as to each case and each reason for the timing of its filing, suffice it to say that the plaintiffs assiduously followed this Court's equitable teachings in withholding the seeking of relief until they were assured of proper standing and they had no reasonable alternative but through litigation.

A second reason why the City's statute of limitations argument is frivolous is that when governments pass

facially unconstitutional laws which interfere with fundamental constitutional rights, each day that such laws remain in effect they unlawfully and prospectively restrain new constitutionally protected activities. As to each such restraint, any statute of limitations period would necessarily commence anew.

Obviously, as a matter of federal equitable policy, this Court has frequently *expanded*, rather than restricted, the rights of litigants to bring facial challenges to substantially overbroad laws which stifle protected expression in a significant number of their applications. *Compare, e.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973); and *Bigelow v. Virginia*, 421 U.S. 809 (1975). As a matter of constitutional policy, it would make little sense to adopt a doctrine forcing one to forever suffer the consequences of living under a facially unconstitutional law stifling future expression, simply because they waited to challenge it until it was certain to adversely affect them. So long as an unconstitutionally overbroad law continues to exert new factual injury to one wishing to exercise rights of free speech prohibited by that law, if there were such a thing as a statute of limitations for injunctive relief in these circumstances, such limitations period must necessarily recommence with each new day that the challenged law assertedly stifles (or threatens to stifle) protected expression.[14]

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[14] Suppose, for example, an overbroad law were enacted preventing the sale or possession of materials which advocate joining one particularly poor obscure religious cult. It could easily be the case that no one immediately affected by the ordinance has sufficient resources to bring an immediate federal declaratory lawsuit challenging it. However, if no lawsuit is

Finally, the policy considerations which cause the imposition of statutes of limitations in damages cases are not present in equitable cases where the constitutionality of laws are at issue. In damages cases, statutes of limitations prevent potentially unending liability exposure for a potential defendant. A primary reason for these limitations periods is that a defendant in a damages cause of action has an increasingly difficult time presenting a defense the longer the period of time between the original injury and notice of the filing of a lawsuit. Witnesses will frequently be lost and memories will fade the greater the period of time following the original injury. No comparable policy consideration supports a governmental agency's right to perpetually rely upon facially unconstitutional statutes. A governmental defendant can just as easily defend a facial constitutional challenge filed twenty years after a statute is enacted as one filed two days after its enactment. The controlling factor is almost always the status of current caselaw, not memories of ancient facts.

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brought challenging the law in the first year after it is enacted, should the city or other governmental entity then be free to keep this facially unconstitutional law on the books permanently? The obvious answer is no. No policy considerations of repose or conservation of judicial resources can possibly justify imposing loss of fundamental liberties as the price for exercising restraint in the filing of federal actions for declaratory and injunctive relief. If a law continues to impose current constitutional harm, it should be challengeable by anyone directly affected thereby, so long as it continues to exert such unconstitutional effect. *C.f.*, *Wooley v. Maynard*, 430 U.S. 705 (1977).

Accordingly, even if this Court were to recognize the existence of statutes of limitations in equitable cases generally, there would have to be an exception to such doctrine where the equitable relief sought was to be free from unconstitutional actions, policies or laws enacted or pursued by governmental agencies.

G. The City's Assertion That Certiorari Should Be Granted To Analyze The "Ripeness" Of The Present Case, Is Also Utterly Without Merit.

The City's third question presented requests certiorari review of whether the present dispute was "ripe" for adjudication. It does not assert that the Court of Appeals opinion is in conflict with the opinion of any other court on this point (nor could it since the Court of Appeal did not even *address* this issue in its interim opinion below). Moreover, the point is clearly untimely as the City never even *asserted* a claim involving ripeness in the Court of Appeals.

In any event, the City's assertion of a lack of "ripeness" is clearly frivolous. Essentially, the City has argued that, simply because respondents' businesses have not yet been forced to close, their claims are somehow not ripe for adjudication. However, but for the issuance of the trial court's preliminary injunction, the ordinance would clearly have compelled the closure of *all* of the plaintiffs' businesses. The entire purpose of the interim injunctive relief was to prevent that injury from occurring until the court could determine the constitutionality of the ordinances at trial.

The City then seems to suggest that there is an additional exhaustion of administrative remedies requirement

which would compel respondents to seek an administrative exception to the ordinance before they would be entitled to claim that their challenge to the ordinance is ripe. However, the only cases they cite for this proposition are cases arising under the "taking" clause of the Fifth Amendment.[15] They neither mention the fact that this Court has repeatedly stated that there is no exhaustion of administrative remedies requirement in actions under 42 U.S.C. § 1983,[16] nor point out that even in the *taking clause* case they rely upon, *Williamson County, supra,* this Court expressly clarified that it was not in any way limiting *Patsy's* clear holding that there is no exhaustion of administrative remedies requirement in 1983 cases. Rather, *Williamson County* clarified that the ripeness issue there recognized is unique to taking clause claims because until one has sought compensation for an allegedly unconstitutional taking, a court cannot determine whether the taking has been *without just compensation.* This narrow exception has no application in the typical civil rights lawsuit not involving a taking clause claim. Any other conclusion would require the outright reversal of both *Patsy* and *Felder,* as well as a long line of additional cases upon which those opinions relied.

Obviously here, each plaintiff has alleged a fully ripe claim because nothing more need necessarily occur in

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[15] *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985); and *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986).

[16] *See, e.g., Patsy v. Board of Regents,* 457 U.S. 496 (1982); and *Felder v. Casey,* 487 U.S. 131 (1988).

order for the plaintiffs to suffer constitutionally cognizable injury under the ordinance.

CONCLUSION

For all the reasons set forth herein, there is no sound jurisprudential reason for this Court to grant certiorari review of the interlocutory opinion below. If this Court truly believes the issues herein may merit ultimate review by this Court, surely the better time to perform that review would be after the trial court has resolved the critical factual issues herein, not the least of which is whether the ordinances here challenged "*effectively* deny[] respondents a *reasonable* opportunity to open and operate [their] adult [businesses] within the city . . . . " *Renton, supra*, 475 U.S. at 54. (Emphasis added.)

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Respectfully submitted,

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